They pleaded guilty and on conviction were sentenced to a term of four months imprisonment each.

Section 169 of the Criminal Procedure Code is the only section which permits more than one person to be charged and tried together and is in the following terms:—

"169. When more persons than one are accused of of the same offence or of different offences committed in the same transaction, or of more than one offence falling within the provisions of section 162 or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence or when one person is accused of the offence of theft or extortion or criminal misappropriation or cheating, or criminal breach of trust, and another of receiving or retaining or assisting in the disposal or concealment of the subject matter of such offence they may be charged and tried together or separately as the court thinks fit and the provisions contained in the former part of this chapter shall apply to all such charges."

On the facts the appellants, each with his own schedule and documents relating to horse betting, should clearly have been charged separately and tried separately as they clearly were not "accused of the same offence or of different offences committed in the same transaction". The mere fact that they were in the same premises when carrying on their alleged unlawful activities is not sufficient to bring them within the provisions of section 169 of the Code.

The appeal must therefore be allowed and the convictions set aside and new trials ordered.

Appeal allowed.

WONG JUAT ENG v. THEN THAW EU & ANOR.

[F.C. (Wylie C.J. (Borneo), Suffian and Gill JJ.) July 23, 1965]

[Kuching — Federal Court Civil Appeal No. 37 of 1965]

Landlord and tenant — Memorandum of sublease — Covenant against assignment without consent in writing — Waiver — Oral permission to sublet — Notice of termination.

Evidence — Parole evidence — Admissibility of.

The respondents' predecessor let certain premises for a term of 15 years to the appellant and her co-tenants under a memorandum of sublease, which contained a covenant that the sublessees were not to assign or sublet the demised premises or any part thereof without the consent in writing of the sublessor. The appellant had sublet rooms on the premises but she alleged that she had obtained verbal permission from the then owner. The respondents gave a month's notice of termination of the sublease and brought an action for possession of the premises. In the courts below (*supra* p. 103) it was held that the evidence of the verbal permission was not admissible and that therefore the subletting was in breach of the terms of the lease.

Held: (1) parol evidence is admissible as evidence of waiver and therefore in this case as the sublessor had waived compliance by the sublessee with the strict terms of the covenant and the latter had acted to her detriment in proceeding with the transactions otherwise than in strict compliance with the covenant, equity will not permit the sublessor to exercise his right to forfeiture based on those transactions;

(2) the sublease could not be terminated by a month's notice and therefore the sublease was not validly terminated and the respondents were not entitled to an order for possession in this case.

Cases referred to:—

(1) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.

(2) *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439.

(3) *Arivaputhira Padavachi* v. *Muthukumaraswamy Padavachi* A.I.R. 1914 Mad. 489.

(4) *Jhabba Singh* v. *Chhajjoo* A.I.R. 1926 All. 445.

(5) *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227 at p. 231.

FEDERAL COURT.

Wylie C.J. (Borneo): This appeal arises from proceedings commenced in the district court at Kuching by the respondents against the appellant claiming possession of certain premises of which the appellant was alleged to be the sole tenant. The respondents claimed to be entitled to an order for possession under paragraphs (b) and (j) of section 15(1) of the Rent Control Ordinance, i.e. on the ground that there had been a breach of obligation on the part of the appellant and on the further ground that the appellant was receiving from subtenants rents exceeding seventy-five per cent of the rent paid by her. These premises were leased by the then registered proprietor of the land to the appellant and three other people for a term of fifteen years from 1st January, 1958, at a rent of $70 a month. A memorandum of sublease was executed and registered in accordance with the provisions of the Land Code, the registered proprietor's interest in land under that code being a leasehold interest. The owner died in 1963 and the respondents are the present owners. On the pleadings, it is common ground that the appellant is now the only tenant, but it is not clear how her co-tenants have been divested of their interest in the sublease. The appellant has parted with possession of parts of the premises both on the ground floor and upstairs to occupants who are either subtenants or licensees.

The memorandum of sublease contained the following covenant on the part of the sublessees:—

"Not to assign or sublet the demised premises or any part thereof without the consent in writing of the sublessor."

There was, however, a covenant on the part of the sublessor —

"To permit the sublessees to grant licence to any person to use any part or parts of the upper floor of the demised premises at any time during the said term of this sublease".

As the sublessees' covenant refers only to

assigning or subletting without written consent, it is not clear why it was necessary for the lessor to covenant specifically that he would permit the grant of licences. However, on the view of the evidence that I take, this feature is not material.

The appellant admits that she has sublet rooms on the top floor and granted a licence to occupy in respect of the whole of the ground floor, reserving common use of bathroom and kitchen facilities located on that floor. In her evidence she stated that she obtained verbal permission from the then owner in respect of these transactions.

The appellant, who conducted her own case in the district court, then wished to call a witness who, she said, would say that he accompanied her to the owner when the latter gave verbal permission. Although her evidence as to verbal permission had not been objected to, on behalf of the respondents it was then submitted that the evidence concerning permission was parol evidence brought to vary the terms of the written sublease. On this ground, the magistrate ruled this evidence inadmissible.

He repeated this view in his judgment, but found that the appellant was "telling the truth about having obtained a verbal permission". He held that the appellant was in breach of the terms of the sublease, apparently because she had not obtained the owner's consent in writing, but held that, because of the verbal consent, it was not reasonable to make an order for possession. He also held that an occupier who paid $300 a month to the appellant was a licensee and therefore this payment was not rent.

The respondents appealed to the High Court at Kuching. The ruling that the evidence concerning a verbal permission was inadmissible appears to have been accepted by that court and the judgment seems to be based on the view that that evidence is inadmissible for all purposes. The High Court also held that the occupier paying $300 a month was a subtenant and not a licensee and that this subletting was in breach of the terms of the main sublease because there was no consent. In consequence, it was held the respondents were entitled to an order for possession on both grounds on which the claim was based.

The appellant has appealed from this decision upon several grounds, one of which is that the sublease has not been determined according to law and another that the failure to obtain written permission to sublet did not, in the circumstances, involve forfeiture of the sublease. The submissions in support of the first ground were to the effect that no proper steps had been taken to determine the sublease according to law and that therefore no order for possession could be made because of the provisions of subsection (3) of section 15 of the Rent Control Ordinance.

In support of the other ground referred to, it was submitted that there had been a waiver of the lessor's right to forfeit the lease, if in fact there had been a subletting without written consent.

It is necessary first to deal with the admissibility of the evidence of a verbal consent. Although it is correct that the terms of this sublease could not be varied by parol evidence, a party to such an instrument may waive his rights thereunder without involving a variation of the terms of the agreement and the evidence to establish such a waiver may be parol evidence. The appellant's evidence is not to the effect that there was an agreement to vary the terms of the sublease for the balance of the term, but that, on two separate occasions, the sublessor gave oral permission — on the first occasion in respect of an upstairs part of the premises, and on the second occasion in respect of the ground floor. The inference from this evidence is not that, on all future occasions, written consent was unnecessary, but that, on each of two occasions, the sublessor waived compliance by the sublessee with her obligation to obtain the sublessor's consent in writing. Parol evidence is admissible as evidence of waiver, although it would be inadmissible as evidence of a variation of the terms of this sublease. See *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[1].

Consequently, this evidence given by the appellent was admissible and the magistrate, who saw and heard this witness, has found that verbal permission was given as described by that witness. As I have said, the inference from that evidence is that the sublessor waived compliance by the sublessee with the strict terms of the covenant. The latter then acted to her detriment in proceeding with the transactions otherwise than in strict compliance with the covenant. In these circumstances, equity will not permit the sublessor to exercise her right to forfeiture based on these transactions. See *Hughes* v. *Metropolitan Railway Co.*,[2] where it was held that a landlord could not obtain an order for ejectment based on non-compliance with the terms of a covenant in the lease, where the non-compliance had been induced by the conduct of the lessor. The equitable principle applicable was stated in these terms at page 448 by the Lord Chancellor:—

> "It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract

will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

The *High Trees'* case [1] is another instance of the application of this principle. There, the lessor was unable to recover the rent reserved and covenanted for in the lease because of a promise to accept a lower rent made without consideration and in a manner which did not in law effect a variation of the terms of the lease.

In my judgment, therefore, no enforceable right to forfeiture had arisen when these proceedings were commenced. The respondents purported to terminate this sublease by giving one month's notice in the form usually given in the case of monthly tenancies. Obviously such a notice cannot terminate a sublease for fifteen years. It follows that this sublease has not been terminated either by exercise of an enforceable right of forfeiture, or otherwise, and that therefore the respondents are not entitled to an order for possession, because section 15(3) of the Rent Control Ordinance requires that, before any order for possession can be made, the lease must have been determined according to law.

This is the position whether or not the respondents can establish facts that would bring the case within paragraph (j) of section 15(1), or, indeed, any other paragraph. It is therefore unnecessary to consider whether or not the transactions concerned were by way of subletting or by way of licence.

For these reasons, this appeal was allowed, the judgment of the High Court set aside and judgment for the appellant substituted, together with an order in her favour for costs of this appeal and of proceedings in both the High Court and the district court.

Suffian J.: I agreed with my Lord the Chief Justice that this appeal be allowed for the reasons stated by him and wish to add only this.

There was difficulty about admitting the oral evidence that the appellant had verbal permission to sublet portions of the upper floor and to give Mr. Teng a licence to occupy the ground floor because the sublease was in writing and had been registered and because of the exception in paragraph (d) of the proviso to section 94 of the Evidence Ordinance, Cap. 54, but in my view the effect of the oral evidence was not in the words of that paragraph to "rescind or modify" nor in the words of the main section to "contradict, vary, add to or subtract from" the sublease, for the verbal permission left the sublease untouched and only had the effect of waiver, waiver that is of the then landlord's right to forfeit the lease in respect of the specific breaches authorised and no other. Just as such oral evidence may be admitted to prove discharge of a liability created by a registered deed (as was pointed out in *Arivaputhira Padavachi* v. *Muthukumaraswamy Padavachi,*[3] followed 12 years later in *Jhabba Singh* v. *Chhajjoo,*[4]) so in my opinion may it be admitted to prove waiver. Also, here the appellant, having relied on the words of the then landlord that she had permission to sublet, etc., and then having acted to her detriment by doing something which might lose her the sublease, it would be unreasonable that the present landlords should be allowed to take advantage of her breach. In the words of Denning J. (as he then was) in *Robertson* v. *Minister of Pensions,*[5] it is a principle of law that "if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given, then, once it is acted upon, he is bound by it."

For these reasons I allowed the appeal and agree with the order made by my Lord the Chief Justice.

Gill J.: This appeal was allowed on the ground that there had been a waiver of the lessor's right to forfeit the lease. We then stated that we would give reasons for our judgment at a later stage.

I have now seen the reasons for judgment by my Lord the Chief Justice, with which I respectfully agree and to which I do not wish to add anything.

Appeal allowed.

ROBIN & ANOR. v. GOH BOON CHOO

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) July 27, 1965]

[Singapore — Federal Court Civil Appeal No. 92 of 1964]

Contract — Conveyance of land by mortgagee — Mortgage executed under forged power of attorney — Common mistake — Total failure of consideration — Conveyancing and Law of Property Ordinance, (Cap. 243) s. 7(1)(F).

Conveyancing — Conveyance by mortgagee — Mortgage executed under forged power of attorney — Common mistake.

The appellants as mortgagees had conveyed certain property to the respondent who had successfully bid for it at an auction. It subsequently appeared that the mortgage to the appellants was executed under a forged power of attorney and the mortgage and the conveyance were set aside. The respondent thereupon brought an action to recover the purchase price and conveyancing costs. The trial judge gave judgment for the respondent as he held there had been a total failure of consideration ([1965] 1 M.L.J. 56). On appeal it was contended that (a) this was a sale by a mortgagee and therefore there was not the usual implied covenants for title and (b) under the conditions of sale, which were part of the contract, the purchaser accepted the risk that the power of attorney under which the mortgage to the appellants was executed might not be valid and subsisting.

Held: (1) this was a case of common mistake leading to impossibility of performance and notwithstanding that an indenture of conveyance had been completed, the respondent was entitled to recover;